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12-2-2015

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Recommended Citation

Written Testimony on Correctional Oversight of the NYS DOCCS: Hearing Before the New York State Assembly Standing Committee on Correction, 2015-2016 Leg. (Dec. 2, 2015) (statement of Michael B. Mushlin, Professor, Pace University School of Law), <http://digitalcommons.pace.edu/lawfaculty/1009/>.

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PACE UNIVERSITY
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**Written Testimony on
Correctional Oversight of the NYS DOCCS**

**Michael B. Mushlin
Professor of Law
Pace Law School**

New York State Assembly Standing Committee on Correction

Chairman Daniel O'Donnell

December 2, 2015

Introduction

Thank you for holding this important hearing and inviting me to testify. My name is Michael B. Mushlin. I am a Professor of Law at Pace University School of Law in White Plains, New York. I am the author of *Rights of Prisoners*,¹ a four volume treatise. I am co-chair with Professor Michele Deitch of the American Bar Association, Subcommittee on Implementation of the ABA Resolution on Prison Oversight. I have served as Chair of the Committee on Correction of the New York City Bar Association, and Chair of the Correctional Association of New York and the Osborne Association. The Osborne Association is an organization that, among many other things, provides training and support programs for people in jail and prison or who are being diverted from imprisonment. The Correctional Association is a 171 year old organization endowed by New York law with the authority to visit New York State Prisons with the responsibility to report on their condition to the public and to the New York state legislature. Currently, I am a board member of the Correctional Association of New York. With colleagues, including Prof. Michele Deitch of the University of Texas, I was one of the organizers of two national conferences on prison reform: the first, *Prison Reform Revisited: The Unfinished Agenda* held at Pace Law School and the second, led by Professor Deitch, entitled *Opening Up a Closed World: What Constitutes Effective Prison Oversight* held at the University of Texas.

¹ MICHAEL B. MUSHLIN, *RIGHTS OF PRISONERS* (4th ed. 2010).

Both conferences drew together professionals including commissioners of correction from all segments of the criminal justice and corrections field to discuss improvements to the operation and oversight of the American prison system. Before entering academia I was staff counsel and then the Project Director of the Prisoners' Rights Project of the Legal Aid Society. I also was staff counsel with Harlem Assertion of Rights Inc., and was the Associate Director of the Children's Rights Project of the American Civil Liberties Union.

I am testifying today on behalf of both myself and my co-chair Michele Deitch, who has submitted written testimony for your consideration. My comments here reflect both the key points in her testimony as well as some of my own thoughts about the importance of external oversight and comments about the critical role played by the Correctional Association of New York, the failure of the State Commission on Correction to provide meaningful regulation of New York's prisons, and the need to improve access by the media to the public and to the state's prisons.

The Critical Importance of External Oversight

Prisoners are under lock and key twenty-four hours a day, seven days a week, and therefore they must depend on their keepers for all their human needs. They are held behind walls and closed doors, living "in a shadow world that only dimly enters our awareness."² American prisons in particular "mainly confine the most powerless groups . . . poor people who are disproportionately African-American and Latino."³ Currently, although there are some bright spots (notably the Correctional Association), New York largely operates "without a comprehensive mechanism for the routine inspection and monitoring of all places of confinement."⁴ Without comprehensive and meaningful oversight these sequestered places of confinement become even more isolated from the society they are designed to serve.

Lacking oversight it is not surprising that in New York there are far too many instances of inhumane conditions, escape, abuse, and even death.⁵ Shorn of oversight, and the public support that it provides, even prison administrators with the best of intentions are not able to run

² O'Lone v. Estate of Shabazz, 482 U.S. 342, 354 (1987) (Brennan, J., dissenting). The discussion in this section of my testimony is drawn from my most recent article, Michael B. Mushlin, *"I Am Opposed to This Procedure": How Kafka's In the Penal Colony Illuminates the Current Debate About Solitary Confinement and Oversight of American Prisons*, 93 Or. L. Rev. 571 (2015). More detail can be found there.

³ GIBBONS & KATZENBACH, CONFRONTING CONFINEMENT 77 (2006).

⁴ AM. BAR ASS'N, STANDARDS ON TREATMENT OF PRISONERS § 23-2.7(a)(2), at 52 (3d ed. 2011). http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/treatment_of_prisoner_s_commentary_website.authcheckdam.pdf.

⁵ See Jessica Bakeman, *Report: New York Solitary Confinements 'Inhumane'*, LOHUD (Oct. 2, 2012), <http://statepolitics.lohudblogs.com/2012/10/02/report-ny-solitary-confinement-conditions-%E2%80%98inhumane%E2%80%9999/>; Joseph Spector, *N.Y. Looks at Prison Reforms After Spectacular Escape*, USA TODAY (June 29, 2015), <http://www.usatoday.com/story/news/politics/2015/06/29/new-york-prison-reform/29487265/>; Terrell Jermaine Starr, *Prison Guard 'Beat Up' Squad Accused of Killing Inmate: Why Prison Abuse is so Common and Overlooked*, ALTERNET (Sept. 3, 2015), <http://www.alternet.org/civil-liberties/prison-guard-beat-squad-accused-killing-inmate-why-prison-abuse-so-common-and>.

decent prisons.⁶ One famous example recounted by Dean Norval Morris is the story of Captain Alexander Maconochie, the British Naval Captain who, in the 1840s, unsuccessfully attempted to implement major reforms to the barbaric practices at the Australian prison colony on Norfolk Island.⁷ Captain Maconochie abandoned his reform efforts due to a lack of outside support.⁸ So too was the fate of Thomas Mott Osborne, who became the warden of Sing Sing Prison with a reform agenda, but whose efforts were overturned.⁹ More recent examples include the experience of the leaders of the penal system of New York City. Despite their efforts, violence against inmates on Rikers Island, the penal island of N.Y.C., has reached epidemic proportions.¹⁰

Some people think that prison officials automatically oppose vigorous oversight. However, that is not true. Many prison officials recognize the importance of public oversight. For example, Jack Cowley, a warden from Oklahoma, wrote that without accountability that comes with oversight, “the culture inside the prisons becomes a place that is . . . foreign to the culture of the real world.”¹¹ A.T. Wall, the director of corrections in Rhode Island, observed that without “light, light, and more light,” there is a real danger of prison abuse, and “we [the public] cannot sit idly by. If we do so, we run the substantial risk that the dynamics of these environments will default to a position where misconduct can ultimately flourish.”¹² Dean Stan Stojkovic, writing in the *Pace Law Review* said that “[w]ithout adequate oversight, correctional problems compounded. Issues like correctional health care, prison crowding, prison violence, and the management of prisons become almost impossible to address.”¹³ No sensible prison administrator wishes this to happen.

Effective external independent oversight requires both regulatory and monitoring power. An agency with regulatory powers can impose and enforce minimum standards. An agency with monitoring powers is also important because unlike a regulatory body they are charged with as my colleague Michele Deitch notes, “routine and regular review of every institution as a preventative measure; it is oversight to help in improvement, not to point out what went wrong.” (emphasis in original).

Both aspects of prison oversight are essential to ensure that New York’s prisons run effectively, that its prisons are safe, and that they operate in a manner that ensures the safety of the prisoners and the staff. Inmates need to be treated with dignity, are productively engaged and are reintegrated into society after their release.

⁶ See Barbara Attard, *Oversight of Law Enforcement is Beneficial and Needed—Both Inside and Out*, 30 PACE L. REV. 1548 (2010); Andrew Coyle, *Professionalism in Corrections and the Need for External Scrutiny: An International Overview*, 30 PACE L. REV. 1548 (2010).

⁷ NORVAL MORRIS, *MACONOCHIE’S GENTLEMEN: THE STORY OF NORFOLK ISLAND AND THE ROOTS OF MODERN PRISON REFORM* (2002).

⁸ *Id.*

⁹ See *Thomas Mott Osborne*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/433764/Thomas-Mott-Osborne> (last visited Jan. 3, 2015).

¹⁰ Editorial Board, Op-Ed, *A ‘Culture of Violence’ at Rikers Island*, N.Y. TIMES (Aug. 5, 2014), <http://www.nytimes.com/2014/08/06/opinion/a-culture-of-violence-at-rikers-island.html>.

¹¹ GIBBONS & KATZENBACH, *supra* note 3 at 16.

¹² *Id.* at 78 (citing testimony of Rhode Island Corrections Director A.T. Wall).

¹³ Stojkovic, Stan Stojkovic, *Prison Oversight and Prison Leadership*, 30 PACE L. REV. 1476, 1483 (2010).

Calls for Oversight

The calls for oversight of penal facilities have been persistent and growing. A leading example is that the American Bar Association (“ABA”) in its Standards for the Treatment of Prisoners, adopted in 2010, declared that “Governmental authorities should authorize and fund a governmental agency independent of each jurisdiction’s correctional agency to conduct regular monitoring and inspection of the correctional facilities in that jurisdiction and to issue timely public reports about conditions and practices in those facilities.”¹⁴

Additionally, the ABA passed a formal Resolution on Oversight which recommends an independent body to monitor prisons. To be effective the oversight body must be adequately funded and staffed; have expertise; conduct regularly scheduled and unscheduled inspections; issue reports on particular problems; have access to all relevant records and the authority to conduct confidential interviews; make investigation reports public; have the authority to require prison administrators to respond publicly to monitoring reports; and develop plans to rectify problems identified.¹⁵ Specifically, the ABA Resolution states “The monitoring entity is independent of the agency operating or utilizing the correctional or detention facility...[and]...The monitoring entity is authorized to inspect or examine all aspects of a facility’s operations and conditions including, but not limited to: staff recruitment, training, supervision, and discipline; inmate deaths; medical and mental-health care; use of force; inmate violence; conditions of confinement; inmate disciplinary processes; inmate grievance processes; substance-abuse treatment; educational, vocational, and other programming; and reentry planning.”¹⁶

The Commission on Safety and Abuse in America’s Prisons, which surveyed the state of the American prison system almost a decade ago also called for a comprehensive system of oversight.¹⁷ It based this recommendation on the reality that “[m]ost correctional facilities are surrounded by more than physical walls; they are walled off from external monitoring and public scrutiny to a degree inconsistent with the responsibility of public institutions.”¹⁸ To rectify this imbalance, the Commission called on every state to create an independent agency to monitor prisons and jails and on the federal government to create a national nongovernmental agency to inspect penal facilities at the request of prison administrators.¹⁹

Joining the movement for greater oversight, the Attorney General of the United States, utilizing the power granted under the Prison Rape Elimination Act (PREA), recently promulgated standards that call for oversight of virtually all penal institutions in the United

¹⁴ ABA STANDARDS § 23-11.3(a).

¹⁵ See generally ABA Resolution on Oversight.

http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_am08104b.authcheckdam.pdf.

¹⁶ ABA Resolution on Oversight § 1, 6.

¹⁷ GIBBONS & KATZENBACH, *supra* note 3.

¹⁸ *Id.* at 15.

¹⁹ *Id.* at 16, 79.

States.²⁰ The standards of PREA aim to ensure that the prisons and jails receiving federal funding take steps to respond to instances of sexual abuse of prisoners and take preventative measures against such abuse.²¹ Following the recommendation of the National Prison Rape Elimination Commission (NPREC)²² in 2009, the Attorney General decided that beginning in August 2013, compliance with PREA standards required audits of all confinement facilities covered under the PREA at least every three years. These audits are necessary for the facilities to be considered compliant with PREA standards, with one-third of the facilities operated by an agency—or private organization on behalf of an agency—audited each year.²³ These include adult prisons and jails, juvenile facilities, lockups (housing detainees overnight), and community confinement facilities, whether operated by the Department of Justice or a unit of a state, local, corporate, or nonprofit authority.²⁴ This oversight, when implemented, will be a significant change, but it is very limited in its scope by focusing on only one problem.

The ABA also recognizes the importance of opening prisons to public view through unofficial, nongovernmental means such as occurs through the work of the Correctional Association of New York. Because “[t]he heightened public awareness resulting from prison and jail visits will result in improvements in conditions and operations,”²⁵ the ABA standards call on government to “encourage and accommodate” visits to prison facilities by “judges and lawmakers and by members of faith-based groups, the business community, institutions of higher learning, and other groups interested in correctional issues.”²⁶ The Commission on Safety and Abuse in America’s Prisons takes a similar position. Recognizing that oversight also includes the involvement of an engaged citizenry, the Commission urged that prisons should be open to

²⁰ Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601–09 (2012).

²¹ *Id.* §§ 15601–02. The Prison Rape Elimination Act was enacted by Congress in 2003 to address the problem of sexual abuse of persons in custody of U.S. correctional agencies, including private and public institutions housing both adult and juvenile offenders, as well as community-based agencies. The Act addresses both inmate-on-inmate sexual abuse and staff sexual misconduct. The major provisions of PREA include a zero tolerance standard for inmate sexual assault and rape; the development of standards for detection, prevention, reduction, and punishment for prison rape; the collection and dissemination of information of incidents of prison rape; and the award of grants to help state and local governments implement the Act.

Under PREA, the Bureau of Justice Statistics (BJS) is required to carry out a comprehensive statistical review and analysis of incidents and effects of prison rape for each calendar year. The review and analysis must be based on a random sample of no less than ten percent of all federal, state, and county prisons; a representative sample of municipal prisons; and include at least one prison from each state. The BJS must utilize surveys and other statistical studies of current or former inmates and ensure the confidentiality of each survey participant. To comply with these requirements, the BJS developed the National Prison Rape Statistics Program (NPRSP), which is comprised of four separate data collection efforts designed to collect multiple measures on the incidence and prevalence of sexual assault, including the Survey of Sexual Violence, the National Inmate Survey, the National Survey of Youth in Custody, and the National Former Prison Survey. Each survey operates as an independent effort which together allow for a deeper understanding of sexual victimization in correctional facilities. *Id.* §§ 15601–09; *see also Prison Rape Elimination Act (Sexual Violence in Correctional Facilities)*, BUREAU OF JUSTICE STATISTICS, <http://www.bjs.gov/index.cfm?ty=tp&tid=20> (last visited Jan. 26, 2015).

²² NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT (2009) (recommending “detailed” and “robust” oversight in order to “open up” prisons to review of their efforts to fight sexual abuse), *available at* <https://www.ncjrs.gov/pdffiles1/226680.pdf>; *see also* Dara Lind, *After 11 Years, States are Finally Committing to Fight Prison Rape*, VOX, <http://www.vox.com/2014/5/20/5731152/states-prison-rape-PREA-certification-standards-11-years> (last updated May 20, 2014, 10:20 AM).

²³ NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT, *supra* note 279, at 87–88.

²⁴ *Id.* at 3.

²⁵ ABA STANDARDS, *supra* note 220, § 23-11.2, at 351.

²⁶ *Id.* § 23-11.2(e), at 348.

visits by citizens and organized groups, and that the media should be given broad access to what happens inside prisons, including having access to facilities, prisoners, and correctional data.²⁷

When external prison oversight is enforced and prison leaders open their doors to regular independent oversight, significant positive changes in the treatment of prisoners and the operation of its prisons will result. My colleague Michele Deitch in her testimony has given a comprehensive view of how New York can implement meaningful oversight of its prisons in a manner which will achieve these results. I would like to add a few additional thoughts first about strengthening the legislative mandate of the Correctional Association, second, about addressing the default of the Commission of Correction, and finally about the need to improve access by the media and the public to our state's prisons and jails.

The Correctional Association

I have a long association with the Correctional Association of New York. The Correctional Association of New York is one of only two private citizen-based organizations in the United States with a legislative mandate to visit prisons and report on the conditions of confinement.²⁸ It has had this mandate for over 169 years and over that time has proven its value over and over again. The Board of Directors of this organization is comprised of private citizens including “prominent citizens, lawyers, advocates, formerly incarcerated individuals, individuals associated with community based organizations . . . and academics.”²⁹ It has fulfilled its role admirably with courage, expertise and fortitude over the many decades of its existence. Brutal 19th Century practices were ended as a result of the advocacy of the Correctional Association, modern innovations for their time such as probation and parole were established, and in recent times the CA has contributed in critical ways to the effort to end the systemic abuse of solitary confinement, improve the treatment of pregnant women including advocating ending the cruel practice of shackling women in labor and before and after birth, and reform the onerous Rockefeller drug laws. These are just a few examples of the critical and enduring importance of the CA. It is a model for the nation and one of the few bright spots in the otherwise dreary landscape of oversight in New York.

But currently the CA is hampered in its ability to do its work. To rectify that this Committee should propose and approve legislation which would strengthen the legislative mandate of the Correctional Association to make it a more effective as a totally independent body which provides invaluable information to the public and to the legislature. Specifically, I fully support the proposals set out in the testimony of the CA to allow it to make unannounced visits to DOCCS prisons, to have confidential communications with incarcerated persons throughout its monitoring visits, to obtain access to all relevant documents, to communicate

²⁷ GIBBONS & KATZENBACH, *supra* note 3. .

²⁸ Jack Beck, Role of the Correctional Association of New York in a New Paradigm of Prison Monitoring, 30 Pace L. Rev. 1572, 1574 (2010).

²⁹ John Brickman, The Role of Civilian Organizations with Prison Access and Citizen Members--The New York Experience, 30 Pace L. Rev. 1562, 1564 (2010) (listing such famous past members of the Correctional Association as Theodore Roosevelt, John D. Rockefeller, Andrew Carnegie, Cornelius Vanderbilt, John J. Astor, Jr., Samuel F. B. Morse, and Jacob H. Schiff).

directly with individual staff members confidentially, and to require DOCCS and OMH to publicly respond in writing to the CA's findings and recommendations.

The New York State Commission of Correction

Unlike most states New York has on its legislative books an agency vested with power to regulate prisons. In New York the governmental oversight body for prisons, jails, and local lockups is the New York State Commission of Correction.³⁰ The Commission has virtually the full panoply of power called for by the ABA resolution. Among other things it is authorized to visit and inspect correctional facilities but also to promulgate rules and regulations establishing minimum standards for the care, custody, correction, treatment, supervision, discipline and other correctional programs for all persons confined in correctional facilities.³¹ It has real powers to compel information including subpoena power, can appoint monitors for failing jails and can even order closed any prison or part of a prison which is "unsafe, insanitary or inadequate to provide for the separation and classification of prisoners." However, while the commission has done some good things through its death investigations, it has utterly failed to carry out its legislative mandate to provide regulatory oversight of New York's prisons. The New York State Comptroller said as much when he reported after his comprehensive audit of the New York State Commission of Correction that:

...The New York State Commission of Correction (SCOC) is not fulfilling its responsibilities for overseeing State correctional facilities. SCOC stopped inspecting DOCS prisons when its staffing levels were reduced during the 1990s. In addition, SCOC did not inspect the State's secure facilities for youths until 2007 and has not promulgated regulations governing their operations, even though it was supposed to begin overseeing these facilities in 1996. In [the opinion of the Comptroller] as a result of this lack of oversight, any unsafe or inappropriate practices at State correctional facilities are less likely to be detected and corrected. [The Comptroller] recommend SCOC establish a system of oversight for these facilities.³²

Either the New York State Commission of Correction should do its job or the Committee should establish another organization that will transfer the power of the Commission to that body. Whichever organization is chosen for this task to ensure independence there should be new legislation to broaden appointment power to the regulatory body. Currently, the Commission consists of three people, each appointed by the governor, by and with the advice and consent of the senate.³³ This means that the person who is appointing the member of the Commission is the person who is in charge of the agency that it will regulate. To ensure independence the appointment power needs to be broadened by having the legislature and/or the judiciary nominate at least one or more of the Commissioners.

³⁰ New York State Constitution, Article XVII, § 5.

³¹ N.Y. Correct. Law Art. 3 § 45(6).

³² *Id.*

³³ N.Y. Correct. Law Art. 3 § 41.

Although effective legislation is essential, it is also important to note that legislation does not replace judicial oversight. Courts have an important role to play in ensuring that the constitutional rights of prisoners, the least politically influential group in our society, are protected.

The Media and the Public's Right to Know

Another important requirement of effective prison oversight is for legislation to protect the right of access to the media and to make sure this access is enforced. As the ABA said in its commentary on its standards providing for opening up prisons to the media on a responsible basis:

Affording members of the media access to correctional facilities is a means of bringing transparency and accountability into the operations of those facilities. Through media reports, the public can be informed about problems that plague a correctional facility, conditions within it, the effectiveness of correctional programs in the facility, and the extent to which incarceration is facilitating or impeding prisoners' adherence to a crime-free lifestyle upon their release from the facility. Additionally, these media reports can highlight the need for operational changes or the allocation of more resources to make the correctional facility safer, more humane, and in conformance with what are considered "best practices" in the field of corrections.³⁴

Currently, the Department of Corrections and Community Supervision provides for media access³⁵ and there are regulations for media access included in the minimum standards for county jails and penitentiaries.³⁶ However, media regulations and policies are not included in the minimum standards for city jails, towns, and village lockups, nor are they included in the minimum standards for state correctional facilities. Moreover, as pointed out in the written testimony of the Correctional Association, the media has had inordinate difficulty in obtaining access to prisons and prisoners by being limited in their ability to meet with prisoners who are willing to meet with them and being restricted in having confidential communications. Moreover, the CA reports that incarcerated people have faced retaliation from DOCCS staff for communicating with the media. In addition, rules prevent the media from interviewing people that the Commission does not approve or interviewing people in solitary confinement even though they are being subjected to the harshest treatment known to current corrections. There are also unreasonable conditions placed on photographing or videotaping prisons.

By contrast, the American Bar Association Standards on the Treatment of Prisoners require prison officials to be open to media by "generally accommodating professionally accredited journalists who request permission to visit a facility or a prisoner," and that members

³⁴ ABA STANDARDS § 23-11.5 (Commentary)

³⁵ See N.Y. Comp. Codes R. & Regs. tit. 7, §§ 8.3, 8.1, 51.14, 51.15, 51.20, 720.7.

³⁶ N.Y. Comp. Codes R. & Regs. tit. 9, § 7023.1.

of the media should be allowed “reasonable use of notebooks, writing implements, video and still cameras and audio recorders.”³⁷ There are caveats that prisoners have the right to refuse a request to visit, that the visits preserve the privacy and dignity of prisoners and the safety of the institution, and that there be reasonable time, place and manner regulations. Also the Standards require that prisoners have the right to refuse interviews and also that there be no retaliation against any prisoner for access to the media.”³⁸ New York state should codify these sensible provisions.

More is required however than access to the media. Prisons should be open to responsible requests by members of the public. Both the ABA and the Commission on Safety and Abuse in America’s Prisons recognize the importance of opening prisons to public view through unofficial, nongovernmental means. Because “[t]he heightened public awareness resulting from prison and jail visits will result in improvements in conditions and operations,”³⁹ the ABA standards call on government to “encourage and accommodate” visits to prison facilities by “judges and lawmakers and by members of faith-based groups, the business community, institutions of higher learning, and other groups interested in correctional issues.”⁴⁰

The Commission on Safety and Abuse in America’s Prisons took a similar position. Recognizing that oversight also includes the involvement of an engaged citizenry, the Commission urged that prisons should be open to visits by citizens and organized groups, and that the media should be given broad access to what happens inside prisons, including having access to facilities, prisoners, and correctional data.⁴¹

Legislation should also provide an adequate opportunity for information derived from prison oversight investigations to be available to the public. It is important for regulatory and monitoring oversight information to be made public so they can know what happens in the prisons. Effective oversight will become even more powerful, beneficial, and productive measure once the information obtained by the oversight agency is provided to the public.

Conclusion

With effective oversight we can do much to improve our prisons and mold them to truly reflect our values and needs. For this reason, I am grateful for this opportunity to testify and for your interest in addressing the need for more effective oversight of our state’s penal institutions. I look forward to working with you as you continue this critically important work.

³⁷ ABA STANDARDS § 23-11.5

³⁸ ABA STANDARDS § 23-11.5

³⁹ ABA STANDARDS, *supra* note 220, § 23-11.2, at 351.

⁴⁰ *Id.* § 23-11.2(e), at 348.

⁴¹ GIBBONS & KATZENBACH, *supra* note 3.